JD–75–98
Indianapolis, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INDIANA PERSONNEL SERVICES, INC.
d/b/a INDIANA TEMPORARY SERVICES

and

Cases 25–CA–24069 Amended
25–CA–24189 Amended

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO, a/w UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

and

KOORSEN PROTECTION SERVICES, INC.

Michael T. Beck, Esq.,
for the General Counsel.
Robert D. Epstein, Esq.,
(Epstein & Frisch),
of Indianapolis, Indiana,
for the Respondent.
Robert H. Morsilli, Esq.,
of Washington, D.C.,
for the Charging Party.

DECISION

Statement of the Case

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on October 21-22, 1996, and on December 8, 1997, upon a consolidated complaint, dated August 19, 1996. The charges were filed by the Road Sprinkler Union on July 7, 1995, in Case 25–CA–24069, on September 5, 1995, in Case 25–CA–24189, on September 11, 1995, in Case 25–CA–24202 and on November 20, 1995, in Case 25–CA–24340. All charges were amended.

Following the trial on October 21 and 22 in 1996, the Respondent's Koorsen Protective Services, Inc. and Indiana Personnel Services, Inc. entered into separate settlement agreements on October 22, 1996. The hearing was adjourned *sine die* pending compliance. The Respondent, Indiana Personnel Services, Inc. failed to comply with the settlement agreement and, upon motion by the General Counsel, the settlement agreement with respect to Indiana Personnel Services was set aside and the hearing resumed on December 8, 1997.

The complaint alleges that Indiana Personnel Services, d/b/a Indiana Temporary Services interrogated employment applicants about their union membership on March 15, 1995, in violation of Section 8(a)(1) of the National Labor Relations Act (the Act) and refused to hire and refused to consider for hire seven named applicants in violation of Section 8(a)(3) and (1) of the Act.

The Respondent denied the commission of any unfair labor practices, although the jurisdictional allegations were admitted. Also admitted were the supervisory status of Cynthia Cummings, owner, Candi McKinnies, branch manager, Diana Biddle-Stancato, senior staff coordinator, Angela Diane Carey and Toni Wells, personnel coordinators.

On the entire record, including my observation of the demeanor of the witnesses and after considering the briefs filed by the General Counsel and the Respondent,[1] I make the following

Findings of Fact

I. Jurisdiction

Indiana Personnel Services Inc. located in Indianapolis, Indiana, is engaged in the operation of a temporary employment personnel agency. With services valued in excess of $50,000 to various enterprises located within the State which sold goods to various enterprises located outside the State of Michigan, the Respondent is admittedly an employer within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent is alleged to be a joint employer with Koorsen Protection Services, Inc.

Road Sprinkler Fitters Local Union No. 669, U.A. AFL-CIO, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO is admittedly a labor organization within the meaning of Section 2(5) of the Act.

Background

Indiana Personnel, as suggested by its name, operates as a temporary employment agency which locates employees on behalf of clients. Koorsen Protection Services, Inc. became a client of Indiana Personnel in November 1994, and requested the Respondent to find and refer pipefitters.

Respondent's personnel coordinator Biddle-Stancato was told by Koorsen to find a few pipefitters who had some experience with blueprints. The Respondent placed advertisements in the Indianapolis Star newspapers calling for 15-20 pipefitters with a clean driving record (over-head sprinkler experience preferred, but not necessary). (G.C. Exh. 3). The ads which ran from 1995, promised immediate employment and directed that applications be filed as follows:

> Mon-Thur 9-11 am or 1-2 pm
> 1813 N. Shadeland

[1] The General Counsel's motion to strike Respondent's brief because it was filed untimely is denied. The Board's rules (Section 102.111) require mailing one day prior to the due date. The Respondent's Certificate of Service shows that documents were postmarked on the due date.

Indiana Temporaries

Seven members of the Road Sprinkler Fitters Local Union 669 (Melvin Curtis, Kirk Bickell, George Garr, John Marye, Gary Ray, David Douglas, and David Fulkerson) applied at various dates in March and April 1995. They went to the Respondent's office as described in the advertisements. They filled out their applications, completed aptitude tests, and were interviewed by a representative of the Respondent. None of the applicants were hired by the Respondent, nor were they referred to Koorsen. During the same time, the Respondent hired several pipefitters and pipefitter's assistants who were not affiliated with any union.

The General Counsel argues that the Respondent unlawfully interrogated one of the union members during the interview about his union affiliation and that the seven union members were not hired because of their membership in a union. The Respondent argues that the applicants were not hired for temporary employment for a variety of reasons, including a lack of orders for pipefitters from Koorsen and the applicants' failure to call Respondent's offices every night to be placed on the availability list.

Of legal significance to the issues in this case is whether the Respondent and Koorsen are considered joint employers.

Analysis

The record shows, contrary to Respondent's argument that the Respondent and Koorsen operated as joint employers. A joint employer may be defined as one who, along with another employer, meaningfully affects the employment relationship as to the hiring, firing, supervision, and direction of employees. Here, the Respondent made the initial hiring decision and employed the individuals for 90 days before they were considered for employment by Koorsen. According to the testimony of Diane Biddle-Stancato, Koorsen usually informed the Respondent how many pipefitters it needed. The Respondent then advertised in local papers inviting applications from qualified individuals. The applicants were interviewed by the Respondent's personnel and also by Koorsen's representatives. The Respondent employed the applicants approved by Koorsen. These employees so hired worked under the supervision of Koorsen's supervisors for 90 days. During that time the employees were paid by the Respondent. They received $10 per hour in pay derived from Koorsen's payment for each employee of $15 per hour to the Respondent. The employees could be fired by either Koorsen or the Respondent.

The record clearly supports the finding that the Respondent and Koorsen were joint employers. Both entities exercised control over the employees. Both companies exercised the authority to hire and fire the employees. Koorsen's payment to the Respondent was used for the hourly pay for Respondent's employees. The Respondent concedes that it made the initial determination as to whether an applicant was referred to Koorsen and that it was responsible for the pay of the temporary employees. While Koorsen retained the primary supervisory authority at their jobsite over the employees, the Respondent had sufficient indicia of control over the employees to establish joint employer status.

With respect to the allegation of unlawful interrogation, the record shows that on March 15, 1994, Toni Wells, personnel coordinator, interviewed Melvin Curtis, a job applicant. Curtis testified that the interview lasted no more than 5 or 10 minutes and that Wells questioned him about the contractors listed on his application, and as to whether they were union employees (Tr. 267).

The Respondent has admitted that on May 16, 1995, Koorsen had informed Diane Biddle-Stancato that Koorsen was not interested in applicants who were union members and that the Respondent should not refer any applicants with union affiliations.

The Respondent's questioning of the employee applicant was clearly designed to comply with Koorsen's wishes. This form of interrogation in the context of a job interview has an inevitably coercive effect on an individual in violation of the applicant's Section 7 rights. I therefore find that the Respondent violated Section 8(a)(1) of the Act.

During the time of March and April, 1995, several candidates with union backgrounds applied for jobs as pipefitters in response to the advertisements in local newspapers. None of the applicants were hired. Other applicants without union background were, however, hired. More specifically, Melvin Curtis saw an advertisement in the newspapers and applied on March 15, 1995, at Respondent's offices. He completed a employment questionnaire and took a written aptitude test (G.C. Exh. 16). He was interviewed by Toni Wells, one of Respondent's personnel coordinators. During the ensuing interview, Wells questioned him about his prior employment with union contractors. Wells sent him to meet Biddle-Stancato. She informed him that Koorsen was looking for fitters and that someone would contact him. Thereafter, Curtis called Respondent's offices numerous times. He was never offered a job (except for a painter's position) as a pipefitter. Curtis was unemployed when he submitted his application and also a member of the Union.

On March 20, 1995, Kirk Bickel had a similar experience. Bickel was a journeyman sprinkler fitter and unemployed when he applied in the morning of March 20. He filled out the application and took the aptitude test (G.C. Exh. 10). The receptionist interviewed him briefly, but the personnel coordinator was speaking on the phone during his presence. He was told that someone from the Respondent would contact him later. But he did not receive a call or a letter in response to his application. Bickel called the Respondent several times without success. Two weeks later the Respondent called him with a job possibility at Deer Creek with another employer. Bickel responded that he was interested only in the job for which he had applied. Bickel was also a member of the Union and showed on his employment application his prior experience with a union contractor.

On the same day, March 20, 1995, George Garr applied for a job at Respondent's offices in response to the Company's advertisement. Garr's application showed that he had more than 20 years of experience in the sprinkler fitting industry (G.C. Exh. 8). Garr wore a union hat when he filled out his application and the aptitude test. During the interview, the Respondent explained the Company's policies but did not question him about his prior experience. The Respondent called him 2 weeks later with a job possibility consisting of picking up trash with another company. He was never contacted about a pipefitter's position.

Another applicant was John Marye, a journeyman pipefitter who applied at the Respondent's facility on March 21, 1995. Marye had learned from Mike Eads, the Union's business agent that the Respondent had advertised pipefitters' positions. Marye was unemployed and had 15 years experience. Like all other applicants, he completed the application questionnaire, and took the aptitude test (G.C. Exh. 8). Marye was interviewed by a woman named Angie. One of his comments to Angie was that he had completed the union apprenticeship program. He also listed a union contractor on his application. As instructed, Marye called the office later that day to speak to Diane. She informed him that the applications had already been forwarded to Koorsen, which presumably meant that his application was not among them. Two weeks later he received a message that a job was available picking up trash at Deer Creek. He never heard from the Respondent about a pipefitters position.

Gary Ray, a pipefitter, applied on March 27, 1995, at the Respondent's facility. His application named two union contractors as prior employees (G.C. Exh. 15). Ray was interviewed by Angela Carey but never referred to Koorsen for employment.

On April 6, 1995, David Douglas a pipefitter with 10 years' experience applied for a job with the Respondent. He was unemployed and heard from his Union that the Respondent was seeking qualified applicants. Similar to the experience of the other applicants, Douglas completed the questionnaire and the aptitude test and handed the material, including a union card and a certificate of his apprenticeship, to the secretary (G.C. Exh. 14). Douglas was interviewed by a woman whose name he did not recall during his testimony. She told him to call if he did not hear anything within 2 weeks. Douglas called on April 17 and was told that the Company would contact him. However, the Respondent did not call him at any time thereafter.

The Respondent, however, hired other employes whose application did not disclose that they had any pipefitting experience (G.C. Exh. 11). The Respondent also hired two pipefitter assistants on April 17, 1995, who were not affiliated with the Union.

On April 20, David Fulkerson, also a member of the Union, applied for employment. He had 20 years' experience as a journeyman pipefitter and was unemployed. Fulkerson visited Respondent's office in the afternoon wearing a hat and shirt showing union indicia. He completed the application and the test which he handed to the receptionist (G.C. Exh. 13). His application included two union contractors as prior employers. The person who interviewed him informed him that the boss was on vacation and that they would be calling him for an interview. A week later the Company called him about a warehouse job. He replied that he was only interested in a pipefitters position, but he was not contacted by the Respondent.

The Respondent conceded that the above-described individuals applied for pipefitting jobs, and that none of them were hired. The Respondent observed that none of these individuals called in every night to Respondent to place [themselves] on the availability list as per Respondent's stated policy. Furthermore, according to the Respondent, it had no orders to be filled for Koorsen at the time the seven applicants presented themselves to the Respondent.

The record, however, shows that the Respondent hired five applicants during the 2 months' period when the seven union applicants submitted their resumes. For example, pursuant to Koorsen's requests on March 15 and 29, 1995, for pipefitters, the Respondent hired George Anderson on March 20, 1995, and Johnny Way on April 3, 1995. These employees had no union backgrounds. And on April 12 and 26, 1995, Koorsen requested pipefitter assistants. The Respondent filled three positions with three nonunion employees, Tom Burton, Jim Ruttencutter, and Ronald Whitner (G.C. Exh. 11).

The record clearly shows that the Respondent was advised not to refer union members to Koorsen for employment. The applicants, Curtis, Bickell, Garr, Marye, Ray, Douglas, and Fulkerson had listed on their applications their prior experience, as instructed. Each of them had worked for at least one union contractor. The Respondent was supplied by Koorsen with the names of union contractors so that a determination could be made which of the applicants had a union affiliation. Biddle-Stancato testified unequivocally that Koorsen's David Bettge provided the names of union contractors to her over the telephone so that she could screen the applicants. She also testified that for at least 2 weeks in March, the Respondent's policy was only to refer applicants without a union background (Tr. 32-34).

In sum, the General Counsel has established a convincing prima facie case of

discrimination. The Respondent advertised jobs and filled them with applicants whose applications revealed an absence of any union affiliation.[2] Seven qualified applicants all of whom were unemployed applied. Yet none were hired. The reason for the Respondent's discrimination is obvious, its client Koorsen made it clear that union applicants were not to be referred.

The Respondent's defense that the applicants would not have been hired even in the absence of any union considerations is totally unconvincing. The applicants carefully followed the instructions of Respondent's representatives who instructed the pipefitters that they would be contacted. The consistent testimony of the seven applicants nowhere suggests that they were told to call every day. Moreover the fact that the Respondent advertised and hired pipefitters and assistant pipefitters belies the argument that the Company was not engaged in hiring applicants. That the Respondent offered jobs to pick up trash to several union applicants also belies the argument that they were considered overqualified as pipefitter assistants. I accordingly find that the Respondent violated Section 8(a)(1) and (3) of the Act.

Conclusions of Law

1. The Respondent, Indiana Personnel Services, Inc., d/b/a Indiana Temporary Services is a joint employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Road Sprinkler Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating a job applicant, the Respondent violated Section 8(a)(1) of the Act.

4. By refusing to hire and refusing to consider for hire the following seven applicants, the Respondent violated Section 8(a)(1) and (3) of the Act: Melvin Curtis, Kirk Bickell, David Fulkerson, George Garr, John Mayre, Gary Ray, and David Douglas.

5. The unfair labor practices found above are unfair labor practices affecting commerce within the meaning of the Section 2(6) of the Act.

[2] The applications of Anderson hired as a pipefitter on March 20, Way hired as a pipefitter on April 3, Burton hired as a pipefitter's assistant on April 17, Ruttencutter hired as a pipefitter's assistant on April 17, Whitmer hired a pipefitter's assistant on April 27 and Kirby and Barry hired as pipefitter's assistants on May 4 reveal no union affiliation (G.C. Exhs. 19, 12, 23-24).

The Remedy

Having found that the Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

Having found that the Respondent unlawfully discriminated against job applicants based upon their union affiliations and sympathies and having found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire the above-named applicants and by refusing to consider for hire the applicants, the Respondent must be ordered to take appropriate action designed to effect the policies of the Act. The remedy in refusal to hire cases is the same as that in the traditional violations of Section 8(a)(1) and (3), namely a make whole order for backpay and reinstatement; the Respondent must be ordered to offer them full and immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of wages or other rights and benefits they may have suffered as a result of the discrimination against them in accordance with the formula prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following[3]

ORDER

The Respondent Indiana Personnel Services, Inc. d/b/a Indiana Temporary Services, Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees and job applicants about their union sympathies and affiliations.

(b) Refusing to hire or consider for employment job applicants because they are members or sympathizers of the Union, or because they worked in establishments which had union contracts.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order consider for hire and offer the applicants, Melvin Curtis, Kirk Bickell, David Fulkerson, Gary Garr, John Marye, Gary Ray, David Douglas employment to jobs as pipefitters or pipefitter assistant jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

privileges previously enjoyed, and make them all whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Preserve and within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Indianapolis, Indiana, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 15, 1995.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 27, 1998.

_____
Karl H. Buschmann
Administrative Law Judge

[4] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate job applicants or employees about their union background or affiliation.

WE WILL NOT refuse to consider for hire or refuse to hire applicants because of their union background or affiliations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Order offer Melvin Curtis, Kirk Bickell, David Fulkerson, George Garr, John Mayre, Gary Ray, and David Douglas immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 575 North Pennsylvania St., Room 238, Indianapolis, Indiana 46204–1577, Telephone 317–226–7413.